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No. 94-1877

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1994

FRANCISCO MAISONET,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI IN THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST JUDICIAL DEPARTMENT

RESPONDENT'S BRIEF IN OPPOSITION

ROBERT T. JOHNSON
DISTRICT ATTORNEY
Bronx County
215 East 161st Street
Bronx, New York 10451
(718) 590-2156
Counsel for Respondent
Counsel of Record

PETER D. CODDINGTON
ROBERT L. MOORE
Assistant District Attorneys
Of Counsel

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QUESTIONS PRESENTED

1. Whether the Fourteenth Amendment prohibits defense counsel in a criminal case from utilizing gender as the basis for the peremptory challenge of a prospective juror.

2. Whether this Court's decision in *J.E.B. v. Alabama ex. rel. T.B.*, 511 U.S.—, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994), should be applied retroactively to Petitioner's case, now on direct review, to bar a gender-based peremptory challenge.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1994

No. 94-1877

FRANCISCO MAISONET,

Petitioner,

-against-

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Petition for a writ of certiorari to the Supreme Court of the State of New York, Appellate Division, First Judicial Department

RESPONDENT'S BRIEF IN OPPOSITION

OPINION BELOW

The Supreme Court of the State of New York, Appellate Division, First Judicial Department, citing *J.E.B. v. Alabama ex. rel. T.B.*, 511 U.S.—, 114 S.Ct. 1419, 128 L.Ed.2d. 89 (1994), affirmed the trial court's finding of a prima facie showing of gender discrimination and pretext in the reasons proffered by petitioner's trial counsel for the peremptory strike of two female venirepersons. Petitioner's claim that the ruling of the trial court violated the constitutional prohibition against *ex post facto* laws was found to be unpreserved as a matter of law and meritless, in any event. The Order of the Appellate Division, First Judicial Department, entered November 17, 1994, affirming the judgment of the Supreme Court of the State of New York, Bronx County, rendered October 29, 1993, is unofficially reported at

618 N.Y.S.2d 718 (1st Dept. 1994), and is contained in Appendix A of the instant petition.

The certificate denying leave to appeal to the New York Court of Appeals from the Order of the Appellate Division, First Judicial Department, affirming the judgment of the Supreme Court of the State of New York, Bronx County, is officially reported as *People v. Maisonet*, 85 N.Y.2d 864 (1995) and appears in Appendix A of the instant petition.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (a).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment XIV of the United States Constitution provides, in pertinent part:

No State shall . . . deprive any person of . . . liberty . . . without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article I, section 9, clause 3 of the United States Constitution provides:

No Bill of Attainder or *ex post facto* law shall be passed.

STATEMENT OF THE CASE

During jury selection at petitioner's trial, the court noted that petitioner had used his peremptory challenges (which had been exhausted at the point of the court's inquiry) to excuse white jurors, and voiced its concern that a racial bias underpinned those strikes (A. 6)[1]. Called upon to provide race-neutral reasons for the challenges of a number of white jurors, counsel proffered the explanation that two of the white jurors he challenged, both male, had friends or relatives who were police officers, and that his challenges related to the jurors' backgrounds. The court then noted that two white female jurors, who had been challenged peremptorily by appellant, were not related to anyone in law enforcement. Counsel replied that "there's going to be a female police officer's testimony [offered at the trial]" (A. 6-7).

Counsel denied that those strikes were based on gender, and submitted reasons for his peremptory challenges[2] (A. 7). The court determined that "three jurors [two by the defense and one by the prosecutor] were challenged because of their sex or [in the case of the prosecutor's questioned challenge] ethnicity", voided the peremptory strikes and placed those individuals on the petit jury (A. 8).

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[1] Numerals preceded by "A" refer to the pagination of Petitioner's Appendix. The Statement of the Case is from the relevant portion of the trial record, which is appended to the petition.

[2] Petitioner asks this Court, for the purposes of this petition, to "assume ... that defense counsel challenged and dismissed two potential female jurors solely because of [their] gender." Petition at p. 6, n. 1.

REASONS FOR DENYING THE WRIT

Point. The constitutional issues have already been determined, adversely to petitioner, in *J.E.B. v. Alabama ex. rel. T.B.*, 511 U.S.—, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994), and *Griffiths v. Kentucky*, 479 U.S. 314 (1987).

Petitioner seeks a writ of certiorari to answer the question whether the Constitutional prohibition against gender-based peremptory challenges should be limited to civil cases and, at the least, to one party to a criminal trial, the government. However, this Court has voided distinctions between the government and private parties invoking state procedural machinery to peremptorily challenge potential jurors in both civil and criminal trials, and does not relegate gender to a position constitutionally inferior to race as an invidious basis for the exercise of peremptory strikes. *Batson v. Kentucky*, 476 U.S. 79 (1986); *J.E.B. v. Alabama ex. rel. T.B.*, *supra*; *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991); *Georgia v. McCollum*, 505 U.S.—, 112 S.Ct. 2348, 120 L.Ed.2d 33 (1992)[3]. The decision of the Supreme Court of the State of New York, Appellate Division, First Judicial Department is thus fully supported by existing precedent of this Court, and the writ should not be granted on this ground.

Petitioner also seeks the certiorari review of this Court to hear his claim that the State Courts unconstitutionally applied existing principles prohibiting racial discrimination in the exercise of peremptory challenges to his case. First, this issue was not raised before the trial court and was not preserved for appellate review[4]. There being an adequate state ground for the

[3] But see *Georgia v. McCollum*, 505 U.S. at—, 112 S.Ct. at 2361, 120 L. Ed.2d at 53, conc. op. J. Thomas ("Next will come the question whether defendants may exercise peremptories on the basis of sex.")

[4] New York Criminal Procedure Law § 470.15 provides, in pertinent part, that "(3) A reversal or a modification of a judgment . . . must be based upon a determination made: (a) Upon the law, or (b) Upon the facts, or (c) As a matter of discretion in the interest of justice, or (d) Upon any two or

denial of this prong of the petition, certiorari should not be granted to answer the question raised. 28 U.S.C. § 1257(a); *Henry v. Mississippi*, 379 U.S. 443 (1965); Cf. *Osborne v. Ohio*, 495 U.S. 103, 125 (1990) (timely, ample objection which brings federal error to the attention of the trial judge is sufficient to serve state interests and to preserve claim for the Supreme Court's review). In any event, *Collins v. Youngblood*, 497 U.S. 37 (1990) defeats Petitioner's *ex post facto* claim, and if the issue is viewed as one of the retroactive application of gender-related *Batson* principles, *Griffiths v. Kentucky*, *supra*, renders the holding of *J.E.B. v. Alabama ex. rel. T.B.*, *supra*, applicable to Petitioner's case. A writ of certiorari should not, therefore, issue on this ground.

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all three of the bases specified in paragraphs (a), (b) and (c). . . . (6) The kinds of determinations of reversal or modification deemed to be made as a matter of discretion in the interest of justice include, but are not limited to, the following: (a) That an error or defect occurring at the trial resulting in a judgment . . . not duly protested at trial as prescribed in subdivision two of section 470.05 so as to present a question of law, deprived defendant of a fair trial."

There is no procedural mechanism in New York state practice that describes or permits an affirmance in the interest of justice. Since the judgment was not reversed or modified, Petitioner's *ex post facto* issue was not, as a matter of state procedural law, reached in the interest of justice (A. 3-4). Petitioner thus incorrectly claims a bypass by the state appellate court of its procedural rule (petition, p. 10, n. 2).

CONCLUSION

FOR THE FOREGOING REASONS, THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

ROBERT T. JOHNSON
District Attorney
Bronx County
Counsel for Respondent

PETER D. CODDINGTON
ROBERT L. MOORE
Assistant District Attorneys
Of Counsel

June 1995